

ORIGINAL

Before the
Federal Communications Commission
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

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Implementation of the

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Pay Telephone Reclassification

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and Compensation Provisions of the

)

Telecommunications Act of 1996

)

CC Docket 96-128

PETITION FOR RECONSIDERATION
POCKETSCIENCE, INC.

Joel Bernstein
Attorney for PocketScience
Halprin, Temple, Goodman and Maher
555 12th Street, N.W.
Suite 950 North
Washington, DC 20004
202-371-9100

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PETITION FOR RECONSIDERATION

PocketScience, through its attorneys, hereby petitions the Federal Communications Commission for reconsideration of its Third Report and Order and Order on Reconsideration of the Second Report and Order in the above-captioned proceeding ("Third Report and Order")¹. PocketScience, having filed comments in the above captioned proceeding, has standing to file this petition for reconsideration.

I. Introduction and Summary.

PocketScience provides an E-mail service called PocketMail. Using a hand-held device similar to a pocket organizer, PocketMail subscribers can send and receive E-mail by calling an 800 number, holding the device up to the receiver and pushing a button on the device. The subscriber's E-mail messages are downloaded into the device and E-mail messages written on the device are sent out, usually in less than 40 seconds. PocketScience charges its PocketMail customers a flat fee of \$9.95 a month, which includes all calls to the 800 access number. The Commission's action in the docket is inconsistent with the

¹ In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Third Report and Order in CC Docket 96-128, Released February 4, 1999.

Communications Act and threatens to stifle this innovative new service by creating significant additional costs to PocketScience and its customers.

Specifically, the Commission's action violates section 276 by creating a payphone subsidy whereby payphones with high amounts of traffic are subsidizing payphones with small amounts of traffic. Additionally, by rejecting PocketScience's request for durational billing, the Commission has placed an unfair burden on PocketScience relative to other long distance subscribers. Finally, the Commission's decision will harm the availability of affordable E-mail access, the most valuable tool of the Internet.

II. The Commission's Action Violates Section 276 and Harms Certain 800 Service Customers.

Congress enacted Section 276, inter alia, to "ensure that all payphone providers are fairly compensated for each and every completed intrastate and interstate call using their payphone."² Section 271 also provides that the Commission "Shall determine whether public interest payphones...should be maintained, and if so, ensure that such public interest payphones are supported fairly and equitably."³ Additionally, the Commission is required to eliminate "all interstate payphone subsidies from basic exchange and exchange access revenues."⁴

² 47 U.S.C. 276(b)(1)(A).

³ 47 U.S.C. 276(b)(2).

⁴ 47 U.S.C. 276(b)(1)(B).

In making a determination that all payphone providers will be compensated in the same manner, whether a particular payphone operated by the provider is profitable or not and whether that payphone is used for one thousand dial-around calls or one dial-around call, the Commission has implemented the same type of subsidy Congress is trying to eliminate. The Commission freely admits that demand varies greatly among locations.⁵ The Commission also notes that "any compensation amount will represent some contribution to common fixed costs or profit." ⁶

The Commission is cognizant that Congress is attempting to eliminate subsidies from the payphone scheme. The Commission writes that "such subsidies distort competition and appear inconsistent with Congress's directive to eliminate other types of subsidies."⁷ Even though the Commission recognizes the inherent problems with payphone subsidies, it continues to adopt a scheme which is rife with those very subsidies.

Logic and sound economics dictate that, if all payphones are treated the same for dial-around compensation purposes, those payphones with high amounts of traffic will generate much more in dial-around compensation than those with low amounts of traffic. For example, under the Commission's decision, a company owning two payphones, one in a busy airport and one at rural grocery market, will earn the same dial-around rate – 24-cents per call. The busy airport phone may be used to place thousands of calls per month, but the rural grocery market may be used to place only one call per month. The dial-around calls

⁵ Third Report and Order at paragraph 36.

⁶ *Id* at paragraph 39.

⁷ *Id* at paragraph 57.

from the busy airport payphone are subsidizing the rural grocery market payphone, in contravention to the plain language of Section 276.

PocketScience does not take issue with the overall compensation due the entire payphone industry from dial-around and 800 subscriber calls. PocketScience does object to the merging of the "economic" and "public interest" components and the negative results this has on many customers.⁸

Assume, arguendo, that the Commission is correct that the average payphone dial-around call should result in a 24-cent payment to the average payphone. Because the compensation mechanism adopted by the Commission is intended to cover the payphone operator's common fixed costs, the compensation rate for high volume payphones, such as those located at airports, should be less than 24-cents, because many more calls are made from those payphones (the Commission steadfastly refuses to acknowledge opportunity costs at these payphones, and believes that the marginal cost of dial-around calls is virtually zero).⁹ By that same logic, the compensation rate for under-utilized payphones should be significantly more than 24-cents.

PocketScience proposes that the Commission adopt a compensation mechanism that will vary with the actual number of dial-around calls placed from the payphone. For administrative convenience, the Commission could create several different tiers of payphones, based on average dial-around usage, and create a rate structure for each tier. In

⁸ PocketScience also objects to the way the costs are distributed to 800 users. See section II, below.

⁹ Third Report and Order at paragraph 39.

adopting such a scheme, the Commission will eliminate any payphone subsidy inherently present in the one-size-fits-all compensation scheme the Commission adopted in the Third Report and Order.

III. The Commission's Order is Internally Inconsistent and Creates an Unfair Burden on Certain 800 Service Customers.

PocketScience does not ask the Commission to reconsider the overall amount of compensation to be paid to payphone providers for dial-around calls. PocketScience objects to the unfair burden placed on PocketScience as an 800 toll free subscriber.

The Commission insists that the Commission's order is fair and equitable to the parties that will ultimately pay the compensation.¹⁰ The Commission, however, also rightly notes that "Economic theory does suggest, however, that the costs of one service should not be cross-subsidized by another service."¹¹ But the Commission only applies that theory in the macro sense – coin calls versus dial-around calls. The Commission completely ignores the argument by PocketScience that certain types of calls, specifically those made by PocketMail customers to the 800 PocketMail access number, will force PocketScience to bear a disproportionately larger share of the cost burden, subsidizing those callers using dial-around calls lasting much longer.

The Commission's recent action will raise the cost of the PocketMail service and could significantly harm PocketMail customers. Where a 40-second call from a payphone

¹⁰ *Id* at paragraphs 54 and 59.

¹¹ *Id* at paragraph 56.

had cost PocketMail about four cents (based on Pocket's rate of .6 cents for every six seconds), the Commission's imposition of a 24-cent surcharge on every call increases the cost of that 40-second call to 28-cents! That is a full seven-fold increase to PocketScience! On the other hand, other long distance customers can make a 10-minute dial-around call from that very payphone and only see an increase of 2.4 cents a minute – barely noticeable at today's dial-around long distance rates. This result was neither considered by the Commission, nor envisioned by Congress. Insofar as it results, in part, from an improper collection of public service costs, it violates the Act.

PocketScience understands that payphone providers should be compensated for the use of their payphones. PocketScience does not want to bear a disproportional amount of that burden. The Commission can easily fix that problem by instituting durational billing for 800 subscriber payphone calls (and all dial-around calls, if the Commission so chooses).

In its comments, PocketScience requested that the Commission institute durational billing for 800 subscriber calls.¹² The Commission rejected the durational methodology based on the comments of AT&T and the American Public Communications Council that such billing will be too expensive to institute.¹³ AT&T states that it would cost millions of dollars to implement durational billing.¹⁴ Considering that there are nearly 1,000,000,000

¹² Pocket Science Comments in the Third Report and Order, at 1.

¹³ Third Report and Order at paragraph 96.

¹⁴ That is a mere pittance compared to the cost to implement the FCC's new truth-in-billing regulations. First Report and Order and Further Notice of Proposed Rulemaking, Truth-in-Billing Principles and Guidelines, CC Docket 98-170, adopted April 15, 1999.

calls placed at U.S. payphones per month,¹⁵ a few million dollars to implement a fair billing scheme does not seem to be a huge financial burden.

AT&T's argument is without any basis in fact and is patently unbelievable. First of all, AT&T will have to identify each call from a payphone in order to bill its subscriber for that payphone surcharge, whether that surcharge is a flat per-call fee or a durational per-call fee. Second, AT&T currently bills most, if not all, of its subscribers on a durational basis. For example, PocketScience's interexchange carrier bills PocketScience on a six second durational basis. Third, different calls are often billed at different rates. Long distance charges may vary depending on the day, the time, and whether the call is intrastate, interLATA, or international. Fourth, it is common for a single call to contain more than one set of costs. Commercial mobile telephone bills often include a charge for airtime, and an additional charge for a landline connection, broken out on a call-by-call basis. Finally, while payphones may not have the technology to monitor the length of calls, the long distance carriers certainly do. The burden should be placed on the long distance carriers to keep accurate records for payphone compensation, as the long distance carriers already have that information necessary to create their subscriber bills.

¹⁵ There are 1,500,000 LEC payphones and 350,000 competitively provided payphones in the United States. First Report and Order in the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket 96-128, FCC 96-388, Released September 20, 1996, at paragraph 9. The average LEC payphone originates about 500 calls per month and the average competitively provided payphone originates 700 calls per month. *Id* at note 28.

Because long distance carriers already bill on a durational basis and already specifically identify dial-around calls made from payphones, it is beyond the realm of logic that it would be any significant burden for long distance carriers to charge a higher durational rate for calls made from payphones in order to compensate payphone providers. Based on the 24-cent per-call compensation rate the Commission adopted in its Third Report and Order, and using four minutes as the average payphone call, the per-minute call surcharge should be six cents. For those subscribers billed in six second increments, that price would be 0.6 cents per six seconds, which by itself would increase the existing charge for PocketScience's 800 service by 100% (a significant increase, but a far more reasonable result than the current scheme).¹⁶ That amount should simply be added to the subscriber bill for the call, whether included in the basic rate for the call, or as a separate line item for that call.

The Commission also bases its rejection of durational billing on the theory that compensation for opportunity costs is not necessary. The Commission stated that evidence presented in the proceeding shows that dial-around calls only occupy 1.8 percent of available payphone usage time.¹⁷ Here again the Commission is using an average for all payphones. Anyone ever stepping off of an airplane at a major airport knows that many (if not all) of the payphones may be in use. In busy airports there is often a line for payphones, meaning that

¹⁶ Indeed, the very different in the magnitude of "costs" for 800 calls from payphones and other 800 calls shocks the conscience and leaves little doubt that what is involved here is nothing but a windfall for a currently favored set of market participants.

¹⁷ Third Report and Order at paragraph 97.

there must be some opportunity costs associated with flat rate compensation for each phone call. The longer the call, the less opportunity for the payphone operator to earn an additional 24-cents. Durational billing, however, will allow the Commission to take opportunity costs into account and more fairly compensate well-utilized payphones.

The Commission claims that companies can always negotiate a price arrangement other than the default price. Unfortunately, 800 subscribers have no opportunity to negotiate with the payphone providers because there is no direct business relationship between the two entities. While it is conceivable that, on its 800 subscriber's behalf, the long distance carriers could negotiate a lower rate, there is little reason to believe that this will take place. The long distance carriers will simply pass on the costs to their subscribers and the subscribers, such as PocketScience, will be forced to pay the default compensation rate.

IV. The Commission's Order Impedes the Achievement of Other Commission Goals.

The Commission, and particularly the Chairman, has long stated that the one of the Commission's main goals is affordable access to the Internet for all Americans.¹⁸

Today, the most dominant use of the Internet is E-mail. E-mail is now one of the most popularly used forms of communication and its use is increasing exponentially. In the digital age, access to E-mail is similar to access to basic telephone service in the analog age. PocketMail provides all Americans affordable E-mail access. E-mail access no longer

¹⁸ See, Remarks by William E. Kennard, Chairman, Federal Communications Commission, to the National Urban League, Philadelphia, Pennsylvania, August 3, 1998.

requires the purchase of a computer or access to the Internet through an Internet Service Provider (ISP). Even the most basic computers cost between \$600 and \$1000 and most ISPs charge about \$20 per month for unlimited access. With PocketMail, the hardware costs are under \$100 for the PocketMail device and service is \$9.95 a month. A PocketMail subscriber does not even need to have a telephone, as PocketMail is accessible by calling an 800 number from any domestic phone.

The Commission's Third Report and Order harms the ability of PocketScience to continue to provide its PocketMail service at these same low rates. As demonstrated above, the Commission's order could increase PocketScience's expenses for certain calls seven-fold. If the Commission does not create a compensation scheme that is fair to 800 subscribers such as PocketScience, PocketScience and PocketMail customers will be subsidizing other dial-around callers. This is contrary to the Commission's goals of getting everyone on the information highway.

Additionally, the Commission has taken the position that it will not impose additional costs on Internet access. In his Press Statement on the Commission's determination regarding reciprocal compensation for Internet-bound traffic, Chairman Kennard stated that "Those employing scare tactics have suggested that the FCC is going to change the way consumers pay for dial-up access to the Internet. Again, nothing could be further than the truth."¹⁹ Unfortunately, for PocketMail customers, the Commission's payphone decision has

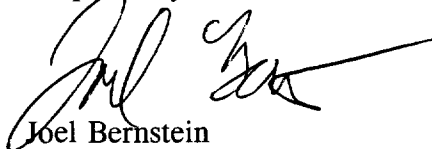
¹⁹ See, Press Statement of William E. Kennard, Chairman, Federal Communications Commission, on the Commission's Adoption of Order Addressing Payment of Reciprocal Compensation for Internet-Bound Traffic, February 25, 1999.

done just that. For PocketMail customers accessing the Internet to retrieve and send their E-mail, the Commission has just imposed a 24-cent surcharge for each time that customer accesses their E-mail.

V. Relief Requested.

PocketScience respectfully asks the Commission to reconsider its Third Report and Order in accordance with these comments by: 1) adjusting payphone compensation to accurately reflect usage levels of specific payphones; and 2) requiring the use of a durational payphone compensation methodology for 800 subscriber calls.

Respectfully submitted,



Joel Bernstein
Attorney for PocketScience

Halprin, Temple, Goodman and Maher
555 12th Street, N.W.
Suite 950 North
Washington, DC 20004
202-371-9100

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